LIBRARY
SUPREME COURT, U. S.

FILED
JUL 18 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 72-~~73~~-140

AGRASHELL, INC.,
Petitioner,

vs.

HAMMONS PRODUCTS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERT C. JOHNSTON
230 Park Avenue
New York, New York 10017

DOUGLAS STRIPP
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioner

Of Counsel:

PAUL R. LAMOREE
1006 Grand Avenue
Kansas City, Missouri 64106

GUY W. SHOUP
230 Park Avenue
New York, New York 10017

July 9, 1973

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented—

1. Can the fact of damage requirement for a treble damage claim which alleged loss of profits be made where the only evidence that claimant has been injured in its business or property was an economist's damage theory that was negated as to its major assumptions and was also found to have "many practical defects" constituting "serious failings" of proof, particularly where the claimant demonstrated neither significant efforts nor a capacity to secure any of the business involved in the contracts held to be in restraint of trade? 2

2. Does a contract with a commission sales agent merely for the distribution of a product warehoused and priced by the manufacturer—the manufacturer's only contract of its kind, and terminable annually on 60 days notice by either party —become in violation of Section 1 of the Sherman Act, for having "extended the life of the patent", upon continuing in effect after the expiration of a patent for the product concerned? 3

Statutory Provisions 3

Statement of the Case—

A. Proceedings in the Court Below 3

B. The Operative Facts 6

1. Agrashell's business 6

2. The Wheelabrator contract 7

3. The Pangborn contract 7

4. Hammons and other SGA manufacturers 8

5. Proof as to the contracts and damage 8

Reasons for Granting the Writ—

I. As to Question 1—

The decision below dangerously vitiates the "fact of damage" requisite of treble damage claims under Section 4 of the Clayton Act, by sustaining a jury's award of "lost profits" based solely on an economist's assumptions which the Court found highly defective 10

II. As to Question 2—

A. The decision below departs drastically from established law by outlawing a single agency contract for sales on commission of a manufacturer's product at his announced price. Unless corrected, the ruling will have far-reaching effects upon beneficial selling arrangements that foster trade and customer service 17

B. The ruling has created a new but inexplicable doctrine, and has let it turn a lawful contract into illegal conduct ex post facto, by holding that a mere sales agency agreement could have "extended the life of the patent" and thus constituted a Sherman Act violation upon continuing in effect beyond the expiration of a patent for the product concerned 20

Conclusion 22

Appendix A: Opinion of the Court of Appeals .... App. 1

Appendix B: Agrashell-Wheelabrator contract of November 1, 1950 ..... App. 35

Note: Unless otherwise indicated, all emphasis is supplied and all bracketed material added.

Table of Authorities

Cases

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 15
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) 15
Herman Schwabe, Inc. v. *United Shoe Machine Corp.*, 297 F.2d 906, 910 (2d Cir., 1962) 16
Perma Mufflers v. *Int'l Parts Corp.*, 392 U.S. 134 (1967) 12
Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) 18, 19, 20
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 15
United States v. *General Electric Co.*, 272 U.S. 276 (1926) 18, 20
Zenith Corp. v. *Hazeltine*, 395 U.S. 100 (1968) 12

Statutes

Sherman Act, Sec. 1, 15 U.S.C. §1 ..... 2, 3
Clayton Act, Sec. 4, 15 U.S.C. §15 ..... 1, 3, 11, 12
28 U.S.C. §1254(1) 2
28 U.S.C. §1337 2
28 U.S.C. §2101(c) 2

In the Supreme Court of the United States

No. 72-_____

AGRASHELL, INC.,
Petitioner,

vs.

HAMMONS PRODUCTS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Agrashell, Inc. ("Agrashell") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled case so far as it affirmed that part of a judgment of the District Court awarding respondent Hammons Products Company ("Hammons") treble damages in the amount of $125,250 for "loss of profits" resulting from violations of Section 1 of the Sherman Act (15 U.S.C. §1).

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 476 F.2d ..... and 177 USPQ 401 (1973), is reproduced as Appendix A *infra*.

Opinions of the Court of Appeals and the same District Court after earlier trial of this case to the court on the issues of validity, infringement and enforceability of petitioner's patent are reported, respectively, at 413 F.2d 89 (8th Cir. 1969, Opinion by Judge Blackmun) and 279 F. Supp. 522 (W.D. Mo. 1967).[1]

JURISDICTION

This petition concerns a counterclaim based on the Anti-Trust laws of the United States, 15 U.S.C. §1, et seq. The courts below had jurisdiction by reason of 28 U.S.C. §1337.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

This petition is timely filed under 28 U.S.C. §2101 (c). The judgment of the Court of Appeals was entered on March 30, 1972 and a timely filed petition for rehearing was denied on May 1, 1973.

QUESTIONS PRESENTED

1. Can the fact of damage requirement for a treble damage claim which alleged loss of profits be made where the only evidence that claimant had been injured in its business or property was an economist's damage theory that was negated as to its major assumptions and was also found to have "many practical defects" constituting

---

1. In a still earlier phase, *Agrashell, Inc.* v. *Hammons Products Co.*, 248 F. Supp. 258 (W.D. Mo. 1965), aff'd 352 F.2d 443 (8th Cir. 1965), Agrashell as exclusive licensee was held not entitled to sue for infringement in its own name without joining the nominal patent owner as a party. This procedural defect was cured before the present action was brought.

"serious failings" of proof, particularly where the claimant demonstrated neither significant efforts nor a capacity to secure any of the business involved in the contracts held to be in restraint of trade?

2. Does a contract with a commission sales agent merely for the distribution of a product warehoused and priced by the manufacturer—the manufacturer's only contract of its kind, and terminable annually on 60 days notice by either party—become in violation of Section 1 of the Sherman Act, for having "extended the life of the patent", upon continuing in effect after the expiration of a patent for the product concerned?

STATUTORY PROVISIONS

Sherman Act, Sec. 1, 15 U.S.C. §1:

> Every contract, . . . in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal.

Clayton Act, Sec. 4, 15 U.S.C. §15:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . .

STATEMENT OF THE CASE

A. Proceedings in the Courts below

This action was commenced in 1965 by petitioner Agrashell for damages for past infringement of an expired patent (Re. 23,422) which Agrashell had acquired by assignment. The patent was granted in 1947 for a discov-

ery by Frank R. Perry of a method of cleaning metal articles by blasting against them ground nutshells of certain hardness and sizes and for the specially sized ground hard nutshell material.

Upon answering the complaint in 1966, Hammons counterclaimed for antitrust damages and for a declaratory judgment of invalidity, non-infringement and unenforceability of the patent, demanding attorneys fees [App. I, 26-29]. The alleged antitrust violation involved, *inter alia*, charges that Agrashell had an "exclusive purchase and price fixing contract" with American Wheelabrator and Equipment Corporation ("Wheelabrator") and also one with Pangborn Corporation ("Pangborn") [App. I, 43-45, 56-57].

Neither party demanded a jury.

The action proceeded in 1967 to trial to the Court on all issues. During that trial, Hammons presented evidence and rested on the validity, infringement and misuse issues, claiming attorneys fees on the basis of them. Both the Wheelabrator contract and the Pangborn contract, whose construction and effect form the basic operative facts of this petition, were placed in evidence. When Hammons then announced readiness to proceed on the antitrust damage claim, the Court ordered the trial continued to enable discovery by Agrashell on new damage theories that had been asserted by Hammons just before the trial [App. III, 1050, 1054-1057].

In post-trial briefs and proposed findings, Hammons urged the Court to find patent misuse in the Pangborn and Wheelabrator contracts because they "extend[ed] the patent monopoly beyond its expiration date", and accordingly to award attorneys fees [App. I, 75, 85-91, 95].

By a memorandum decision and judgment entered in November, 1967, the District Court dismissed the claim for patent infringement and denied the claim for attorneys fees [App. I, 103]. No misuse was found. *Agrashell* v. *Hammons,* 279 F. Supp. 522 (1967). Appeals were taken by both parties, and the judgment was affirmed. *Agrashell* v. *Hammons,* 413 F.2d 89 (1969).

Eighteen months after the service of the answer presenting the counterclaims and six months after the District Court's 1967 judgment, Hammons moved for a jury trial of the antitrust counterclaim—upon no factual showing other than it had changed from patent counsel to antitrust counsel. The motion was granted over strenuous objections based on the prior waiver and the prior trial of the patent misuse issues [App. I, 104, 111-113].

Trial of the counterclaim was to a jury. In its course, the Court stated inadvertently before the jury that "The patent [Agrashell's Perry patent] was determined legally by the Court of last resort as an *illegal* patent" [App. II, 290 T].

In instructing the jury, the trial Court referred to allegations that Agrashell controlled the prices of its soft grit abrasive materials, and stated:

> "Now, there was not evidence that if that happened, that that damaged Hammons in any way because there wasn't any evidence that they sold it below cost or to run Hammons out of the market." [989 T].

The jury returned a verdict of $162,374.21 for patent litigation expenses and $41,750.00 for loss of profits, which the district court increased to $775,733.76 by trebling those amounts and adding $150,000.00 for attorneys' fees and $13,361.31 for costs.

The Court of Appeals reversed the judgment for patent litigation expenses, ruling that Hammons "did not make a submissible case under Section 2 of the [Sherman] Act" [Opinion, p. 15]. It left standing the judgment for "loss of profits".

All of Hammons' various allegations of illegal conduct by Agrashell were held by the Court of Appeals to be untenable as a basis for the jury verdict, excepting only the contracts with Wheelabrator and Pangborn.

B. The Operative Facts

1. Agrashell's business

Agrashell is a small Los Angeles company which in the 1930's pioneered the development of commercial products from waste nut shells.

In 1945 Agrashell entered into the production of hard nutshell blast cleaning abrasives from apricot pit shells and black walnut shells, for military use according to the Perry invention [778-779 T]. This material, trademarked as its Shelblast product, became one of a number of materials referred to as "soft grit abrasive" (SGA). In 1947, upon learning that the Perry patent was about to be issued, Agrashell obtained an exclusive license under the patent [800 T].

In order to develop the industrial market, which is located principally in Eastern and Midwest industrial areas, Agrashell shipped the product in carloads to warehouses located near the prospective consumers, keeping stocks there at its own risk and expense, and sought agents who, for sales commissions, would develop sales and give prompt service to customers [781-785 T].

2. The Wheelabrator contract

In 1950, Wheelabrator became a Shelblast selling agent under a contract which it drafted (856 T), reproduced as Appendix B *infra*. By its terms, Agrashell appointed Wheelabrator as a *del credere* factor to sell and service its Shelblast products for a percentage commission on orders it transmitted (¶¶ 1, 7). Agrashell agreed to fill the orders promptly, failing which Wheelabrator could obtain similar material elsewhere (¶ 5). Wheelabrator would quote the prices announced by Agrashell (¶ 10).

Either party could terminate the agreement at any anniversary date by sixty days notice (¶ 11).

The Wheelabrator contract contains no mention of any patent or any patent license other than to hold the agent harmless from patent infringement (¶ 13).

3. The Pangborn contract

In 1962, a suit by Agrashell against Pangborn for infringement of the Perry patent was settled by Pangborn's acknowledgement of the validity of the patent and its request for an agency to supply Agrashell's patented nutshell SGA products. This resulted in the Pangborn contract, made March 29, 1962 for a term of five years [737-740 T, 811-815 T]. Its provisions differed from those of the Wheelabrator contract principally in that (a) Pangborn did not agree to quote prices announced by Agrashell; (b) Pangborn agreed not to deal in nutshell SGA other than Agrashell's until June 10, 1964 (the patent expiration date), after which it could procure other nutshell SGA on more favorable terms if Agrashell should fail to meet them.

4. Hammons and other SGA manufacturers

Hammons in 1957-1958 entered the market for the Perry patent material by producing it in and selling direct from a black walnut shelling plant at Stockton, Missouri. Hammons' SGA is made entirely from black walnut shells. Hammons soon had captured 100% of the large Detroit area automotive market for the material.

During the alleged damage period at least ten companies other than Agrashell and Hammons manufactured SGA, and various other companies distributed the material [Opinion, p. 4].

Agrashell and Hammons are nearly identical in size. Hammons' business prospered and grew during the alleged damage period.

5. Proof as to the contracts and damage

The Wheelabrator contract and the Pangborn contract were made twelve years apart. Neither Wheelabrator nor Pangborn was a consumer of SGA, other than for demonstration purposes; both were manufacturers of blast cleaning equipment who simply made the abrasive available to customers as a service to them.

Agrashell through the contracts and the services of Wheelabrator and Pangborn was able to supply ultimate customers who bought in small quantities; their orders could be delivered promptly in a variety of sizes from Agrashell's regional warehouses [Opinion, pp. 22, 24].

Hammons, in contrast, sold direct, or to jobbers for resale from warehouses owned by the jobbers, or by manufacturers' representatives with orders shipped direct from Hammons' plant. Hammons did not maintain regional warehouse facilities in order to service small orders, and did not actively solicit them [Opinion, pp. 22, 24].

Hammons made *no* attempt during the alleged damage period to secure any business from either Wheelabrator or Pangborn. Its only contacts with Wheelabrator were in response to some routine sales literature received from Wheelabrator in 1957 and by a small sale of SGA to Wheelabrator in 1958. Hammons' representative visited Pangborn in 1958 and 1962—*before* Pangborn was an Agrashell agent—but not afterward [Opinion, p. 23].

And, as the Court of Appeals stated:

> "*More importantly, there was no evidence tending to show why Hammons could not sell direct or through agents to the ultimate consumers who were purchasing from Agrashell through* [*Wheelabrator and Pangborn*]" [Opinion, p. 23].

The jury award for "loss of profits" was based *solely* upon a theory presented in the testimony of an economist concerning damages allegedly sustained by Hammons [Opinion, pp. 14-15]. This theory was based on *assumptions* regarding the effect, as "barriers" to trade, of a number of circumstances, and did not purport to conclude that under any hypothetical state of facts Hammons would or could have secured the business Agrashell did through Wheelabrator, Pangborn, or any other particular agent.

The economist's theory assumed that because the sales by Hammons and Agrashell of different grades of SGA to a single large purchaser's plant over a seven-year period had been in a tonnage ratio of 60:40 (in Hammons' favor), Hammons but for four assumed "illegal barriers" would have secured 60 percent of the total SGA business Agrashell conducted through its principal agents, enumerated to include Wheelabrator, Pangborn, and twelve others unrelated to the contracts here in question. *No* consideration was given to the differences of customers,

products, service, quantities and delivery needs, nor to the fact that at least ten other manufacturers and various distributors were competing in the SGA market.

Most importantly, Hammons adduced *no* proof that it even attempted during the damage period to secure any of the business done by Agrashell through Wheelabrator or Pangborn, or that its own business in SGA was *in fact* injured *in any way* by the existence of either the Wheelabrator contract or the Pangborn contract.

REASONS FOR GRANTING THE WRIT

I. As to Question 1

The decision below dangerously vitiates the "fact of damage" requisite of treble damage claims under Section 4 of the Clayton Act, by sustaining a jury's award of "lost profits" based solely on an economist's assumptions which the Court found highly defective.

The primary issue before the Court of Appeals as stated in its opinion [Appendix A, p. 15] was

> "Whether Hammons failed to establish that Agrashell had violated the Sherman Act and by so doing proximately injured Hammons."

The opinion of the Court narrowed that primary issue by ruling that the only violations which the jury could have correctly found consisted of violations of Section 1 by the Wheelabrator contract and the Pangborn contract. These violations were held to have arisen from the continuance of the Wheelabrator contract after the Perry patent expired and from Agrashell's first option to supply Pangborn's requirements of nutshell SGA, which existed under

the Pangborn contract for 2 years and 10 months after the patent expired.

A basic question then remained under Section 4 of the Clayton Act as to whether *any* evidence warranted the jury's finding that Hammons' business was caused losses of profits by reason of either or both of the contracts. Was there sufficient evidence that the existence of the Wheelabrator contract had injured Hammons' business? Was there evidence that its business was injured by reason of the 3-year supply option provided for Agrashell by the Pangborn contract?

Upon the opinion of the Court of Appeals, it is apparent that, as a *matter of fact*, there was *no* evidence that Hammons was actually caused *any* loss of business.

During the alleged damage period, Hammons did not even solicit business from Pangborn or Wheelabrator [Opinion, p. 23]. There was no evidence that it actively solicited [or that it even knew of] the ultimate consumers who were purchasing from Agrashell through Pangborn or Wheelabrator [Opinion, pp. 23-24]. In fact, its sales efforts were "rather ill-suited to acquiring the business" of Pangborn or Wheelabrator, for Hammons had only one salesman; it sold its SGA only by direct shipments from its black walnut shelling plant in Missouri; and Hammons did not, while Agrashell did, maintain regional warehouses in order to provide prompt delivery of small quantities of various sizes and types of products on orders serviced by agents [Opinion, pp. 22-24].

There was a *total lack* of *factual* evidence that Hammons suffered any injury by reason of the contracts held forbidden. Quite to the contrary, Hammons prospered in its own way of doing business, and it demonstrated neither the intent nor the capacity to even attempt to serve the

purchasers whose needs were served by Agrashell's sales from regionally warehoused stocks with the aid of Wheelabrator and Pangborn as provided by their contracts.

Section 4 of the Clayton Act authorizes a *recovery* which is available only to a person "who shall be *injured* in his business or property *by reason of* anything forbidden in the antitrust laws". Proof of the *fact* of *at least some* profits having actually been lost because of a violation found is manifestly prerequisite to a lawful recovery of threefold an amount claimed as lost profits.

This Court has consistently held to the intent of the statute:

> "Under §4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct *caused the damages* alleged in the complaint." *Perma Mufflers* v. *Int'l. Parts Corp.*, 392 U.S. 134, 143 (1967) (Mr. Justice White, concurring).
>
> ". . . the fact of damage under §4 . . . is . . . that the illegality is shown to be a *material cause* of the injury . . ." *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 114 n. 9 (1968).

In the *Zenith* opinion, this Court held that Zenith had not met the burden of proof of the fact of damage as to certain markets and expressed the criteria of such proof as follows:

> ". . . the issue is whether . . . Zenith intended to enter [the allegedly foreclosed market], had the capacity to do so, and was prevented from entering by [the unlawful conduct] . . . If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith

would not have met its burden under §4." (395 U.S. at 126-127).

The court below has not applied these or any equivalent criteria to the factual situation carefully set out in its opinion. Had it applied them, the award for "lost profits" could not have survived its analysis of the evidence. Thus, Hammons' failure to seek business from or through Wheelabrator or Pangborn, or even from the customers they served, demonstrated lack of desire and intent to secure the portions of the SGA market they served. Hammons' way of doing business only by direct shipment from its plant [also, the fact that it used only one salesman] demonstrated lack of capability to serve the customers they served. Hammons' failure to solicit the sources of the business Agrashell had and its expert's inability to explain why it had not attempted to secure it [Opinion, p. 24, n. 8] further demonstrated the total absence of any factual basis for concluding that Hammons was prevented by the Pangborn contract or by the Wheelabrator contract from securing any part of the Agrashell sales it claimed "it *should* have had" [Opinion, p. 19].

Instead of adducing any factual proof that its business was injured by the contracts, Hammons resorted to an economist's theory as its *only* evidence of the alleged damage. Its resort to this entirely theoretical basis was itself a significant indication that there was no evidence of any actual damage.

The economist's theory provided no evidence that Hammons was in *fact* caused any loss of profits by reason of the Pangborn contract or by reason of the Wheelabrator contract. It showed no business relationship at all, either actual or attempted, between Hammons and Pangborn, or Hammons and Wheelabrator, or Hammons

and any purchaser of Agrashell's SGA supplied through Pangborn or Wheelabrator.

The Court of Appeals very carefully analyzed some of the premises and assumptions of the economist's theory, pointing out that, although unique, it had "many practical defects" which constituted "serious failings" and that important assumptions in it were "highly suspect", unreliable, and "conclusively negated" [Opinion, pp. 21-24].

The Court, however, after pointing out how defective and unreliable the damage theory really was, proceeded nevertheless to sustain the jury's award of lost profits with this seriously fallacious theory as its *only* foundation.

The Court failed to observe that Hammons' sales of a special grade of SGA direct to a single large purchaser's plant in Columbus, Ohio [i.e., the Hammons part of the economist's assumed 60:40 sales ratio], where that purchaser had had no business relation with either Pangborn or Wheelabrator, could not by any manner of reasoning be considered as evidence of Hammons having been caused any loss of profits or sales by reason of the Pangborn contract or by reason of the Wheelabrator contract.

Also, the Court overlooked that under the trial court's instruction that there was no evidence that Agrashell's alleged control of prices damaged Hammons in any way (989 T), and in light of its own holding [Opinion, pp. 23-24] that the higher prices Agrashell's ultimate consumers were paying should have made it easier for Hammons to compete, the pricing provision of the Wheelabrator contract, the *only* offense found in it, could not have damaged Hammons. This being so, the "lost profits" award could not stand on any theory, for the portion of it attributed to the Pangborn contract by the economist's theory [DX 595, 596] was at most $16,185 and thus only a fraction of the verdict of $41,750 for loss of profits.

The Court sustained the "lost profits" award upon the economist's theory, although having shown it to be thoroughly misfounded and incredible; by stating that "our critique . . . must be tempered . . . by the Supreme Court's statements relating to the proper function of an appellate court when reviewing damage evidence." Then the Court [Opinion, p. 25] quoted a passage from *Zenith*, 395 U.S. at 114 n. 9, and stated that this Court had "consistently reminded critics of damage formulations that an antitrust violator may not properly complain about damage proof vagaries when such ambiguity results from the illegal act itself", citing two cases.[2]

The cited reminders of this Court, however, were directed to vagaries of proof of *amount* of damage. Even if the unique, palpably misfounded economist's theory employed in this case might be tolerated judicially as a basis for calculating an amount of damages, once the *fact* of damage had been proved, there is no warrant in either Section 4 or any decision of this Court, or in any other found authority, for permitting such a plainly fallacious theory to be utilized in place of proof that the treble damage claimant did *in fact* suffer *at least some* injury proximately caused by a related antitrust violation. As this Court stated in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931):

> "* * * there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the cer-

---

2. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

tain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

A similarly incredible economist's theory was advanced and *totally rejected* as the basis for a treble damage claim in *Herman Schwabe, Inc.* v. *United Shoe Machine Corp*, 297 F.2d 906, 910 (2d Cir.), cert. denied, 369 U.S. 865 (1962), a case mentioned on page 19 of the opinion below. In *Schwabe*, Judge Friendly's opinion recited principles for judging what evidence is worthy of consideration by a jury, and stated that "the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take. Many decisions have rejected evidence of injury and damage comparable in weight with that submitted here [citing cases]." (297 F.2d at 912).

The decision below is contrary to the plain terms of §4; it misapplies to the issue of fact of damage principles stated by this Court in reference to amount of damage; it overlooks the criteria laid down by this Court for proof of the *fact* of damage; it is clearly inconsistent with the rejection of the same kind of damage theory by the Court of Appeals for the Second Circuit in the *Schwabe* case.

Both courts below accepted a "highly questionable", "conclusively negated" economist's theory which has "serious failings" as the sole evidentiary basis for a treble damage award. This dangerously vitiates the "*fact* of damage" requisite of treble damage claims under §4. The ingenuity of man in devising adventuresome theories for collecting money as treble damages will have few bounds if the theories acceptable can be based on assumptions so little related as are those of Hammons' expert to even the *existence*, let alone the effects, of operative facts.

The one success of such a theory can only lead to more and more cases of claimants seeking to devise like theories and assert them in treble damage claims. Apart from the unjust burdens and dangers which thus befall the targets of the claims, more such claims can ill be afforded at a time when the courts are already hard pressed to handle the growing volume of well-founded litigation.

II. As to Question 2

A. The decision below departs drastically from established law by outlawing a single agency contract for sales on commission of a manufacturer's product at his announced price. Unless corrected, the ruling will have far-reaching effects upon beneficial selling arrangements that foster trade and customer service.

In holding the Agrashell-Wheelabrator contract to have "extended the life of the patent", and to be "violative of Section 1 of the Sherman Act" and a "contract in restraint of trade", the Court of Appeals departed fundamentally from the common law and from the law long established in this Court.[3]

Never before to our information has a finding of illegal conduct attached to the beneficial practice of promoting the distribution and sale of a manufacturer's unconsigned stock of his product by contracting with a com-

---

3. Although another and different contract with the Pangborn Corporation was also held unlawful in part, the award of $41,750 could not be supported on the basis of the Pangborn contract alone. Hammons' claimed loss of profits with regard to Pangborn was only $16,185 (per PX 596; the figure was less under its alternate computation on PX 595); of that, only about $12,600 accrued during the period after the patent expired, when the provision the Court of Appeals ruled unlawful was in effect (June 11, 1964 to March 29, 1967).

mission agent to secure orders for the product at the manufacturer's price.

The Wheelabrator contract (Appendix B) is a simple, pure sales agency agreement. It involves no consignment of goods. It places *no* restriction upon the agent beyond normal provisions for timely payment for shipments he authorizes, due accounting for amounts due less commissions, and quotation of the price announced by Agrashell for intended sales of a product to be shipped directly to buyers from Agrashell's own plant or warehouse facility.

That such a contract is entirely lawful, both at common law and under the Sherman Act, was held by this Court in *United States* v. *General Electric Co.*, 272 U.S. 476 (1926):

> The owner of an article, *patented or otherwise*, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. 272 U.S. at 488.

This rule was confirmed in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), where the entire Court declined to overrule *General Electric* although the extensive system of coercive "consignment" contracts involved in *Simpson* was found to be an illegal price-fixing combination. This Court there stated that:

> . . . an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. *There is nothing illegal about that arrangement.* 377 U.S. at 21.

In this case, the court below cited *Simpson* for comparison with its ruling on the Wheelabrator contract. But

Simpson clearly is inapposite so far as it found an anti-trust violation. The violation found there arose from the facts that (1) Union Oil used a "consignment" scheme "to cover a vast gasoline distribution system, fixing prices through many retail outlets" [there were 1,978 gas station-lessee "agents", i.e., 99% of the lessees, and 1,327 or 63% of the non-lessee "agents", under the contracts] and (2) the prices set by Union were imposed and *maintained by coercion,* as was vividly demonstrated by Simpson's suit which came about because his lease was terminated, driving him out of business, for his having failed to conform to the prices imposed by Union Oil.

There is no parallel in this case to the basis of the decision in *Simpson:* Agrashell made no consignment of its product. The Wheelabrator contract governed dealings with only one distributor, and was its *only* contract requiring orders to be taken at Agrashell's prices. There was no coercion; in fact, the simple agency contract involved here was drafted by Wheelabrator, not Agrashell. There was *no* "price fixing" in the sense of *Simpson,* where the thousands of "consignment" contracts were holdable only by adherence to the gasoline price set by Union Oil and amounted in effect to a market-wide imposition of the manufacturer's price on thousands of potentially competing traders at the same level of distribution.

The result of the ruling of the Court of Appeals is to place every supplier of a product that may be patented, who has an agency agreement for the sale of his product at his price, in jeopardy of a treble damage suit the day after the patent, if any, expires.

B. The ruling has created a new but inexplicable doctrine, and has let it turn a lawful contract into illegal conduct ex post facto, by holding that a mere sales agency agreement could have "extended the life of the patent" and thus constituted a Sherman Act violation upon continuing in effect beyond the expiration of a patent for the product concerned.

The Court of Appeals recognized that under the *General Electric* rule, 272 U.S. at 448, the Wheelabrator contract, considered as a contract of agency, was not in violation of the antitrust law when it was made in 1950, or during the 14 years up to June 10, 1964 when the Perry patent expired [Opinion, pp. 17-18].

Nonetheless, without mention of any authority or any reason for so ruling, the Court said "we think that whatever protection *General Electric* afforded the Wheelabrator contract ended when the patent expired" and, since the contract continued afterward, "the jury could have correctly concluded that the Wheelabrator contract extended the life of the patent . . . and constituted a contract in restraint of trade."

This ruling is in clear conflict with the ruling in *General Electric* that the owner of an article, *patented or otherwise*, is "not violating . . . the Anti-Trust law . . . by . . . fixing the price at which his agents transfer the title from him." It similarly contradicts a like statement in *Simpson*, 377 U.S. at 21, where *unpatented* products were involved.

It is apparent that the Court's rationale has turned the lawful Wheelabrator contract into illegal conduct *ex post facto*. A *mere* sales agency agreement clearly lawful when made in 1950 is held to have become illegal solely because

of having continued in effect after the expiration in 1964 of a patent that claimed the product being distributed under the contract. It has been so condemned, after the fact, although *no* unlawful act was committed either by the making of the contract or by ensuing years of the selling relationship under it. Remarkably, the sole event held to cause illegality, after 14 years of a lawful business relationship, was that a patent expired by operation of the patent law.

Manifestly, a vast reordering of common commericial affairs will be mandated by such a doctrine. The mere possession of a patent right, whether being enforced or not, would become a Sword of Damocles over any producer who had contracted with an agent to further the original sale at his price of products made under the patent.

While the expiration of the Perry patent ended any influence *the patent* might have had on Wheelabrator's reasons for contracting to become a commission agent for Agrashell's SGA, it did not alter or affect the contract in any respect. As far as the contract was concerned, Wheelabrator was free at all times to deal in anyone's SGA at any price. Most importantly, since Wheelabrator was free to end the contract by mere notice at the end of any year after 1950, the expiration of the patent in 1964 could only have *enhanced* Wheelabrator's freedom to choose the product or products it wanted to promote from among the soft grit abrasive products of Agrashell's competitors [there were at least *twelve* companies then engaged in the manufacture of soft grit abrasive].

Both before and after the expiration of the patent, the Wheelabrator contract continued only because of a year to year election by Wheelabrator to continue serving as a selling agent for Agrashell; after the patent expired Wheel-

abrator and the customers it served were totally free to deal in, buy and use the SGA of any of twelve or more different suppliers, at any price they would quote.

It defies all reason to rule that a contract which was lawful during the period when a patent might have influenced the continuance of it became a violation of Section 1 upon the expiration of the patent, at which time there was not even the extraneous influence of the patent to induce continuance of the contract or to inhibit Wheelabrator from selling whatever SGA it wished, obtained at whatever price from whatever of the many available sources it might elect to use.

CONCLUSION

This petition for a writ of certiorari should be granted as to both of the questions presented.

Respectfully submitted,

ALBERT C. JOHNSTON
230 Park Avenue
New York, New York 10017

DOUGLAS STRIPP
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioner

Of Counsel:

PAUL R. LAMOREE
1006 Grand Avenue
Kansas City, Missouri 64106

GUY W. SHOUP
230 Park Avenue
New York, New York 10017